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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JASON GERLACH and MANUEL)	
MAYORAL, on behalf of themselves and)	CASE NO. 1:16-cv-00860
all others similarly situated,)	
)	<u>CLASS ACTION</u>
Plaintiffs,)	
)	Complaint for Damages and Injunctive
vs.)	Relief Pursuant To The Telephone
)	Consumer Protection Act, 47 U.S.C § 227
CONN APPLIANCES, INC D/B/A)	<i>et seq.</i>
CONN'S, CONN'S, Inc. and CONN)	
CREDIT CORPORATION, INC.)	<i>Jury Trial Demanded</i>
)	
Defendants.)	
)	

INTRODUCTION

1. Jason Gerlach and Manuel Mayoral ("Plaintiffs") bring this class action for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Defendants, CONN APPLIANCES, INC. D/B/A CONN'S,

1 CONN'S, Inc., and CONN CREDIT CORPORATION, INC. (hereinafter collectively
2 referred to as "CONN'S") and their present, former, or future direct and indirect parent
3 companies, subsidiaries, affiliates, agents, assigns, and/or related entities, in negligently,
4 and/or willfully, contacting Plaintiffs on Plaintiffs' cellular telephones without their
5 prior express consent, in violation of the Telephone Consumer Protection Act, 47 U.S.C.
6 § 227 *et seq.*, ("TCPA"). Plaintiffs allege as follows upon personal knowledge as to
7 themselves and their own acts and experiences, and, as to all other matters, upon
8 information and belief, including investigation conducted by their attorneys.

9 **JURISDICTION AND VENUE**

10 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) of the Class Action Fairness
11 Act ("CAFA") because Plaintiffs allege a national class, which will result in at least one
12 class member belonging to a different state than that of Defendants. Plaintiffs seek up to
13 \$1,500.00 (one-thousand-five-hundred dollars) in damages for each call in violation of
14 the TCPA, which, when aggregated among a proposed class numbering in the
15 thousands, or more, exceeds the \$5,000,000.00 (five-million dollars) threshold for
16 federal court jurisdiction under CAFA. Therefore, both the elements of diversity
17 jurisdiction and CAFA jurisdiction are present.

18 3. Venue is proper in the United States District Court for the Western District of
19 Texas, Austin Division pursuant to 18 U.S.C. § 1391(b)(c) and § 1441(a) because
20 Defendants are deemed to reside in any judicial district in which they are subject to
21 personal jurisdiction at the time the action is commenced, and because Defendants'
22 contacts with this district are sufficient to subject Defendants to personal jurisdiction.
23 On information and belief, Defendants have made the same calls complained of by
24 Plaintiffs within this judicial district, such that some of Defendants' acts in making such
25 collection calls have occurred within this district.

26 **PARTIES**

27 4. Plaintiff, JASON GERLACH ("Plaintiff Gerlach"), is, and at all times
28 mentioned herein was, a citizen and resident of the State of Texas who resides in
Devine, Texas.

1 5. Plaintiff, MANUEL MAYORAL (“Plaintiff Mayoral”), is, and at all times
2 mentioned herein was, a citizen and resident of the State of Texas who resides in Austin,
3 Texas.

4 6. Plaintiffs are informed and believe, and thereon allege, that Defendants,
5 CONN’S, at all times mentioned herein were, Corporations founded, whose primary
6 corporate offices are located at 3295 College Street, Beaumont, Texas 77701 making the
7 Defendants citizens of Texas for diversity purposes. Plaintiffs allege that at all times
8 relevant herein Defendants conducted business in the State of Texas and in the County
9 of Travis, and within this judicial district. Defendants attempt to collect debts owed to
10 them by, among other means, making calls to cellular phones owned by debtors’
11 relatives, references, and third-parties believed to be debtors or debtors’ contact points.

12 **THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**
13 **(TCPA), 47 U.S.C. § 227**

14 7. In 1991, Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. §
15 227 (TCPA),¹ in response to a growing number of consumer complaints regarding
16 certain telemarketing practices.

17 8. The TCPA regulates, among other things, the use of automated telephone
18 equipment, or “autodialers.” Specifically, the plain language of section 227(b)(1)(A)(iii)
19 prohibits the use of autodialers to make any call to a wireless number in the absence of
20 an emergency or the prior express consent of the called party.²

21 9. According to findings by the Federal Communication Commission (“FCC”), the
22 agency Congress vested with authority to issue regulations implementing the TCPA,
23 such calls are prohibited because, as Congress found, automated or prerecorded
24 telephone calls are a greater nuisance and invasion of privacy than live solicitation calls,
25 and such calls can be costly and inconvenient. The FCC also recognized that wireless

27 ¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat.
28 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the
Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

² 47 U.S.C. § 227(b)(1)(A)(iii).

1 customers are charged for incoming calls whether they pay in advance or after the
2 minutes are used.³

3 10. On January 4, 2008, the FCC released a Declaratory Ruling wherein it
4 confirmed that autodialed and/or prerecorded message calls to a wireless number by a
5 creditor (or on behalf of a creditor) are permitted only if the calls are made with the
6 “prior express consent” of the called party.⁴ The FCC “emphasize[d] that prior express
7 consent is deemed to be granted only if the wireless number was provided by the
8 consumer to the creditor, and that such number was provided during the transaction that
9 resulted in the debt owed.”⁵

10 **BACKGROUND FACTS AS TO DEFENDANTS, CONN’S**

11 11. Defendants, CONN’S are, and at all times mentioned herein were, entities that
12 meets the definition of “person,” as defined by 47 U.S.C. § 153 (32).

13 12. At all times relevant Defendants conducted business in the State of Texas and in
14 the County of Travis, within this judicial district.

15 13. Defendants, CONN’S, tout themselves collectively as a specialty retailer
16 currently operating in approximately 100 retail locations in Arizona, Colorado,
17 Louisiana, Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South
18 Carolina, Tennessee, and Texas. CONN’S also states that it provides flexible in-house
19 credit options for its customers.⁶

20 14. CONN’S, under the name CONN, is a publicly traded company whose stock is
21 registered and traded on the NASDAQ Global Select Market.

22
23
24
25 ³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of*
26 *1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

27 ⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer*
28 *Protection Act of 1991 (“FCC Declaratory Ruling”)*, 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications
Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008).

⁵ *FCC Declaratory Ruling*, 23 F.C.C.R. at 564-65 (¶ 10).

⁶ Found at <http://ir.conns.com/>, last visited on September 11, 2015.

15. Defendants operate under the assumed business names “Conn’s” and “Conn’s HomePlus” which are trademarks owned by CONN’S. CONN’S also owns the trademarks “YES Money” and “YE\$ Money.”

16. Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, CONN’S is required to prepare annual reports (“Form 10-K”) and file each Form 10-K with the United States Securities Exchange Commission (“SEC”).

17. CONN’S prepares and files a Form 10-K with the SEC annually and each Form 10-K, and all amendments (if applicable), that CONN’S has prepared and submitted to the SEC can be accessed and viewed through the SEC website.⁷

18. Each Form 10-K prepared by CONN’S and all amendments (if applicable) from 2008 to 2015 can be accessed and viewed on CONN’S website.⁸

19. Each Form 10-K prepared by CONN’S are executed by at least a majority of the members of the Board of Directors of CONN’S, on behalf of CONN’S.

20. Upon information and belief, execution of a Form 10-K, or an amendment to Form 10-K (if applicable), by a member of the Board of Directors of CONN’S is a representation by the executing member that the information and data disclosed and presented therein is true and accurate.

21. In its Form 10-K for the fiscal year ended January 31, 2015, CONN’S states each of the following:

a) “Unless the context otherwise indicates, references to ‘Conn’s,’ the ‘Company,’ ‘we,’ ‘us,’ and ‘our’ refer to the consolidated business operations of Conn’s, Inc. and its wholly-owned subsidiaries.”

b) “Conn’s is a leading specialty retailer that offers a broad selection of quality, branded durable consumer goods and related

⁷ <http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001223389&type=10-K&dateb=&owner=exclude&count=40>

⁸ <http://ir.conns.com/annual-proxy.cfm>

1 services in addition to a proprietary credit solution for its core credit
2 constrained consumers.”

3 c) “We operate two reportable segments: retail and credit.”

4 d) “A significant portion of our customer credit portfolio is due
5 from customers that are considered higher-risk, subprime borrowers.”

6 e) “A large portion of our credit portfolio is to customers
7 considered to be sub-prime borrowers, who have limited credit history,
8 low income or past credit problems. Entering into credit arrangements
9 with such customers entail a higher risk of customer default, higher
10 delinquency rates and higher losses than extending credit to more
11 creditworthy customers. While we believe that our pricing and the
12 underwriting criteria and collection methods we employ enable us to
13 manage the higher risks inherent in issuing credit with sub-prime
14 customers, no assurance can be given that such pricing, criteria and
15 methods will afford adequate protection against such risks. We have
16 experienced volatility in delinquency and charge-off rates on our credit
17 contracts. Payments on some of our credit accounts become delinquent
18 from time to time, and some accounts end up in default, due to several
19 factors, such as general and local economic conditions, including the
20 impact of rising interest rates and unemployment rates. As we continue
21 to expand into new markets, we will obtain new credit accounts that may
22 present a higher risk than our existing credit accounts since new credit
23 customers do not have an established credit history with us.”

24 f) “Our liquidity position and profitability are heavily dependent on
25 our ability to collect our customer receivables. If our customer
26 receivables portfolio were to substantially deteriorate, the liquidity
27 available to us would most likely be reduced due to the challenges of
28 complying with the covenants and borrowing base calculations under
our revolving credit facility and our earnings may decline due to higher
provisions for bad debt expense, higher servicing costs, higher net
charge-off rates and lower interest and fee income.”

g) “Our ability to operate our business from day to day, in particular
our ability to manage our credit operations and inventory levels, largely
depends on the efficient operation of our computer hardware and
software systems.”

FACTS SURROUNDING CONN’S USE OF AN ATDS

22. Texas Utility Code § 55.121 defines an “automatic dial announcing device”
 (“ADAD”) as, “equipment used for telephone solicitation or collection that can:

“(A) store telephone numbers to be called or produce numbers to be called through use of a random or sequential number generator; and

“(B) convey, alone or in conjunction with other equipment, a prerecorded or synthesized voice message to the number called without the use of a live operator.”

23. Texas Utility Code § 55.130(a) states, “A person may not use an automated dial announcing device without a permit issued by the commission.”

24. The definition of an ADAD under Texas Utility Code § 55.121 is coextensive with the definition of an ATDS under 47 U.S.C. § 227(a)(1).

25. Since at least 2006, Defendants, or their predecessors, have maintained a permit to use an ADAD from the Public Utility Commission of Texas.

26. In its Form 10-K for the fiscal year ended January 31, 2008, CONN’S stated:

a) “We maintain a predictive dialer system and letter campaign that helps us contact between 25,000 and 30,000 delinquent customers daily. We also maintain an experienced skip-trace department that utilizes current technology to locate customers who have moved and left no forwarding address.”

b) “We employ Nortel telephone switches and state of the art Avaya predictive dialers, as well as a redundant data network and cable plant, to improve the efficiency of our collection and overall corporate communication efforts.”

27. Attached hereto as **Exhibit 1** are true and accurate copies of CONN’S 2008 ADAD Registrations.

28. The Avaya ADAD units identified in **Exhibit 1** are the same Avaya predictive dialers referenced in CONN’S Form 10-K for the fiscal year ended January 31, 2008.

29. In its Form 10-K for the fiscal year ended January 31, 2009, CONN’S stated:

a) “We maintain a predictive dialer system and letter campaign that helps us contact between 30,000 and 35,000 delinquent customers daily. We also maintain an experienced skip-trace department that utilizes current technology to locate customers who have moved and left no forwarding address.”

b) “We employ Nortel telephone switches and state of the art Avaya predictive dialers, as well as a redundant data network and cable plant, to improve the efficiency of our collection and overall corporate communication efforts.”

30. Attached hereto as **Exhibit 2** are true and accurate copies of CONN’S 2009 ADAD Registrations.

31. The Avaya ADADs identified in **Exhibit 2** are the same Avaya predictive dialers referenced in CONN’S Form 10-K for the fiscal year ended January 31, 2009.

32. In its Form 10-K for the fiscal year ended January 31, 2010, CONN’S stated:

a) “We maintain a predictive dialer system, including virtual collection systems, and letter campaign that helps us contact over 35,000 delinquent customers daily. We also maintain an experienced skip-trace department that utilizes current technology to locate customers who have moved and left no forwarding address.”

b) “We employ Nortel telephone switches and state of the art Avaya predictive dialers, as well as a redundant data network and cable plant, to improve the efficiency of our collection and overall corporate communication efforts.”

33. Attached hereto as **Exhibit 3** are true and accurate copies of CONN’S 2010 ADAD Registrations.

34. The Avaya ADADs identified in **Exhibit 3** are the same Avaya predictive dialers referenced in CONN’S Form 10-K for the fiscal year ended January 31, 2010.

35. In 2011, CONN’S purchased and implemented predictive dialer equipment and services from Noble Systems Corporation.

36. In its Form 10-K for the fiscal year ended January 31, 2011, CONN’S stated:

a) “We employ an intensive credit collection strategy that includes dialer-based calls, virtual calling and messaging systems...”

b) “We maintain a predictive dialer system, including virtual collection systems, and letter campaign that helps us contact and speak to over 26,000 delinquent customers daily. We also maintain an experienced skip-trace department that utilizes current technology to locate customers who have moved and left no forwarding address.”

1 c) “We employ Nortel telephone switches and Avaya predictive
2 dialers, as well as a redundant data network and cable plant, to improve
3 the efficiency of our collection and overall corporate communication
4 efforts.”

5 37. Attached hereto as **Exhibit 4** are true and accurate copies of CONN’S 2011
6 ADAD Registrations.

7 38. The Avaya ADADs identified in **Exhibit 4** are the same Avaya predictive
8 dialers referenced in CONN’S Form 10-K for the fiscal year ended January 31, 2011.

9 39. CONN’S registered and used the ADADs identified in **Exhibit 4** during 2011 in
10 connection with outbound calling.

11 40. In its Form 10-K for the fiscal year ended January 31, 2012, CONN’S stated:

12 a) “We employ an intensive credit collection strategy that includes
13 dialer-based calls, virtual calling and messaging systems...”

14 b) “In addition to our underwriting personnel, as of January 31,
15 2012, we employed approximately 360 people in our collections
16 department who service 100% of our active customer credit
17 portfolio...We employ an intensive credit collection strategy that
18 includes dialer-based calls, virtual calling and messaging systems...”

19 c) “We maintain a predictive dialer system, including virtual
20 collection systems, and letter campaigns that help us contact and speak
21 to customers daily. We also maintain an experienced skip-trace
22 department that utilizes current technology to locate customers who have
23 moved and left no forwarding address.”

24 d) “We employ Nortel telephone switches and a Noble Systems
25 hosted predictive dialer, as well as a redundant data network and cable
26 plant, to improve the efficiency of our collection and overall corporate
27 communication efforts.”

28 41. Attached hereto as **Exhibit 5** are true and accurate copies of CONN’S 2012
ADAD Registrations.

42. CONN’S registered and used the ADADs identified in **Exhibit 5** during 2012 in
connection with outbound calling.

43. In its Form 10-K for the fiscal year ended January 31, 2013, CONN’S stated:

1 a) "...as of January 31, 2013, we employed approximately 325
2 people in our collections department who service our active customer
3 credit portfolio. We also utilize a third-party collection agency to service
4 a portion of our active portfolio...We employ an intensive credit
5 collection strategy that includes dialer-based calls, virtual calling and
6 messaging systems, inside collectors that contact borrowers at phone
7 numbers they provide..."

8 b) "We maintain a predictive dialer system, including virtual
9 collection systems, and letter campaigns that help us contact and speak
10 to customers daily. We also maintain an experienced skip-trace
11 department that utilizes current technology to locate customers who have
12 moved and left no forwarding address."

13 44. Attached hereto as **Exhibit 6** are true and accurate copies of CONN'S 2013
14 ADAD Registrations.

15 45. CONN'S registered and used the ADADs identified in **Exhibit 6** during 2013 in
16 connection with outbound calling.

17 46. In its Form 10-K for the fiscal year ended January 31, 2014, CONN'S stated:

18 a) "...as of January 31, 2014, we employed approximately 530
19 people in our collections department who service our active customer
20 credit portfolio."

21 b) "We employ an intensive credit collection strategy that includes
22 dialer-based calls, virtual calling and messaging systems..."

23 c) "We maintain a dialer system, including virtual collection
24 systems, and letter campaigns that help us contact and speak to
25 customers daily. We also maintain skip-tracing processes that utilize
26 current technology to locate contact information for customers who have
27 moved and left no contact information."

28 47. Attached hereto as **Exhibit 7** are true and accurate copies of Conn's 2014
ADAD Registrations.

48. Conn's registered its Noble Systems Corporation equipment for the first time in
2014

49. CONN'S registered and used the ADADs identified in **Exhibit 7** during 2014 in
connection with outbound calling.

1 50. In its Form 10-K for the fiscal year ended January 31, 2015, CONN'S stated:

2 a) "We employed over 700 individuals in our collections
3 department who service our active customer credit portfolio. We also
4 utilize collection agencies to service portions of our active and charged-
5 off portfolio, which provide approximately 130 additional agents located
6 in Phoenix, Arizona."

7 b) "We employ a credit collection strategy that includes dialer-
8 based calls, virtual calling and messaging systems, inside collectors that
9 contact borrowers, collection letters, e-mails, and text messages, a legal
10 staff that processes claims and attends bankruptcy hearings, and
11 voluntary repossession. We also utilize current technologies that assist
12 us in locating contact information for customers who have moved and
13 left no contact information."

14 51. Attached hereto as **Exhibit 8** are true and accurate copies of CONN'S 2015
15 ADAD Registrations.

16 52. CONN'S registered and used the ADADs identified in **Exhibit 8** during 2015 in
17 connection with outbound calling.

18 53. In its Form 10-K for the fiscal year ended January 31, 2016, CONN'S stated:

19 a) "Our collection activities involve a combination of efforts that
20 take place in our Beaumont and San Antonio, Texas collection centers.
21 We employed approximately 830 full time and part time individual
22 collectors and support personnel who service our active customer credit
23 portfolio. We also utilize collection agencies to service portions of our
24 active and charged-off portfolio, which provide approximately 350
25 additional agents located in Phoenix, Arizona."

26 b) "We employ a credit collection strategy that includes dialer-
27 based calls, virtual calling and messaging systems, inside collectors that
28 contact borrowers, collection letters, e-mails, and text messages, a legal
29 staff that processes claims and attends bankruptcy hearings, and
30 voluntary repossession. We also utilize current technologies that assist
31 us in locating contact information for customers who have moved and
32 left no contact information."

33 54. Attached hereto as **Exhibit 9** are true and accurate copies of CONN'S 2016
34 ADAD Registrations.

35 55. CONN'S registered and has used the ADADs identified in **Exhibit 9** during
36 2016 in connection with outbound calling.

1 56. Given the number of delinquent customers CONN'S contacts daily and the
2 number of individuals employed in CONN'S collections department, it would be
3 impracticable for CONN'S representatives to manually dial the telephone numbers of
4 customers that CONN'S was attempting to reach.

5 **PERTINENT FACTS REGARDING CALLS MADE TO PLATINIFF GERLACH**

6
7 57. Beginning no later than January 2013, and continuing through approximately
8 July of 2015, Defendants, CONN'S, called Plaintiff Gerlach, on his cellular telephone
9 number, ending in "4662", in an attempt to collect a debt. Plaintiff Gerlach received
10 multiple calls a day from CONN'S and has, at the time of filing this complaint, received
11 more than twenty debt collection calls from CONN'S.

12 58. Plaintiff Gerlach did not provide Defendants with his cellular telephone number.
13 Plaintiff Gerlach did not give Defendants prior express consent to call him on his
14 cellular telephone with the use of an autodialer and/or prerecorded message, pursuant to
15 47 U.S.C. § 227 (b)(1)(A).

16 59. Based upon information and belief, CONN'S attempts to collect money that it is
17 owed on delinquent credit accounts and in the process, calls cellular telephone numbers
18 where it lacks express written consent.

19 60. On information and belief, Defendants may have obtained Plaintiff Gerlach's
20 cellular telephone number from a third party, or by "skip tracing" or "trapping" the
21 number (i.e., making a record of his cell phone number using caller identification
22 technology) but did not receive that number from Plaintiff Gerlach. Plaintiff Gerlach is
23 not a CONN'S customer and did not agree to an extension of credit from CONN'S.

24 61. Notwithstanding the fact that Plaintiff Gerlach did not provide Defendants with
25 his cellular telephone number at any time, Defendants, or their agents, have called
26 Plaintiff Gerlach on his cellular telephone via an "automatic telephone dialing system,"
27 ("ATDS") as defined by 47 U.S.C. § 227 (a)(1).

28 62. Said "ATDS" calls were made from approximately June of 2013 to
approximately July of 2015, all in violation of the TCPA.

63. The telephone number Defendants and/or their agents called is assigned to a cellular telephone service for which Plaintiff Gerlach incurs a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).

64. These telephone calls constituted calls that were not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

65. These telephone calls by Defendants and/or their agents violated 47 U.S.C. § 227(b)(1).

66. Under the TCPA and pursuant to the FCC's January 2008 Declaratory Ruling, the burden is on Defendants to demonstrate that Plaintiff Gerlach provided express consent within the meaning of the statute.

FACTS CONCERNING CALLS MADE TO PLAINTIFF MAYROAL

67. Beginning in approximately February of 2014, and continuing through approximately August of 2015, Defendants, CONN'S, called Plaintiff Mayoral, on his cellular telephone number, ending in "5893", in an attempt to collect a debt. Plaintiff Mayoral, at the time of filing this complaint, believes that he has received more than twenty debt collection calls from CONN'S.

68. Plaintiff Mayoral did not provide Defendants with his cellular telephone number. Plaintiff Mayoral did not give Defendants prior express consent to call him on his cellular telephone with the use of an autodialer and/or prerecorded message, pursuant to 47 U.S.C. § 227 (b)(1)(A).

69. Based upon the manner and method by which CONN'S contacted Plaintiff Mayoral, Plaintiff Mayoral believes that CONN'S obtained his cellular telephone number in an attempt to contact the true debtor and account holder that CONN'S was seeking. Plaintiff Mayoral believes that his number could have been provided to CONN'S by a third-party but he did not provide his phone number to CONN'S. Plaintiff Mayoral is not a signatory or obligor on any account with CONN'S and does not owe a debt to CONN'S.

70. Notwithstanding the fact that Plaintiff Mayroal did not provide Defendants with his cellular telephone number at any time, Defendants, or their agents, have called

1 Plaintiff Mayoral on his cellular telephone via an “automatic telephone dialing system,”
2 (“ATDS”) as defined by 47 U.S.C. § 227 (a)(1).

3 71. Said “ATDS” calls were made from approximately February of 2014 to
4 approximately August of 2015, all in violation of the TCPA.

5 72. The telephone number Defendants and/or their agents called is assigned to a
6 cellular telephone service for which Plaintiff Mayoral incurs a charge for incoming calls
7 pursuant to 47 U.S.C. § 227 (b)(1).

8 73. These telephone calls constituted calls that were not for emergency purposes as
9 defined by 47 U.S.C. § 227 (b)(1)(A)(i).

10 74. These telephone calls by Defendants and/or their agents violated 47 U.S.C. §
11 227(b)(1).

12 75. Under the TCPA and pursuant to the FCC’s January 2008 Declaratory Ruling,
13 the burden is on Defendants to demonstrate that Plaintiff Mayoral provided express
14 consent within the meaning of the statute.

15 **CLASS ACTION ALLEGATIONS**

16 76. Plaintiffs bring this action on behalf of themselves and on behalf of all others
17 similarly situated (“the Class”).

18 77. Plaintiffs represent, and are members of, the Class, consisting of:

19
20 *All persons within the United States who received any telephone call from*
21 *Defendants or their agents to said person’s cellular telephone through the*
22 *use of any automatic telephone dialing system in connection with*
23 *Defendants’ attempts to collect a debt who did not provide prior express*
consent to Defendants, within the four years prior to the filing of the
Complaint in this action.

24 78. Excluded from the Class are Defendants and any entities in which Defendants
25 have a controlling interest, Defendants’ agents and employees, the Judge to whom this
26 action is assigned and any member of the Judge’s staff and immediate family, and
27 claims for personal injury, wrongful death, and/or emotional distress.
28

1 79. Plaintiffs do not know the number of members in the Class, but believe the total
2 number of class members to be in the tens of thousands, if not more. Thus, this matter
3 should be certified as a Class Action to assist in the expeditious litigation of this matter.

4 80. Plaintiffs and members of the Class were harmed by the acts of Defendants in,
5 but not limited to, the following ways: Defendants, either directly or through their
6 agents, illegally contacted Plaintiffs and the Class members via their cellular telephones
7 by using an autodialer, thereby causing Plaintiffs and the Class members to incur certain
8 cellular telephone charges or reduce cellular telephone time for which Plaintiffs and the
9 Class members previously paid; by having to retrieve or administer messages left by
10 Defendants during those illegal calls; and invading the privacy of said Plaintiffs and the
11 Class members. Plaintiffs and the Class members were damaged thereby.

12 81. This suit seeks only damages and injunctive relief for recovery of economic
13 injury on behalf of the Class and it expressly is not intended to request any recovery for
14 personal injury and claims related thereto. Plaintiffs reserve the right to expand the
15 Class definition to seek recovery on behalf of additional persons as warranted as facts
16 are learned in further investigation and discovery.

17 82. The joinder of the Class members is impracticable and the disposition of their
18 claims in the Class action will provide substantial benefits both to the parties and to the
19 Court. The disposition of the claims in a class action will provide substantial benefit to
20 the parties and the Court in avoiding a multiplicity of identical suits. The Class can be
21 identified through Defendants' or their agents' records.

22 83. There is a well-defined community of interest in the questions of law and fact
23 involved affecting the parties to be represented. The questions of law and fact to the
24 Class predominate over questions that may affect individual Class members, including
25 the following:

- 26 a) Whether, within the four years prior to the filing of this Complaint,
27 Defendants and/or their agents made any call (other than a call made for
28 emergency purposes or made with the prior express consent of the called party)
to a Class member using any automatic telephone dialing system to any
telephone number assigned to a cellular telephone service;

- b) Whether Defendants can meet its burden of showing they obtained prior express consent (i.e., consent that is clearly and unmistakably stated), during the transaction that resulted in the debt in question being owed, to make such calls;
- c) Whether Defendants' conduct was knowing and/or willful;
- d) Whether Defendants are liable for damages, and the extent of statutory damages for such violation; and
- e) Whether Defendants should be enjoined from engaging in such conduct in the future.

84. As persons that received numerous calls using an automatic telephone dialing system, without their prior express consent, Plaintiffs are asserting claims that are typical of the Class. Plaintiffs will fairly and adequately represent and protect the interests of the Class in that Plaintiffs have no interests antagonistic to any member of the Class.

85. Plaintiffs and the members of the Class have all suffered irreparable harm as a result of the Defendants' unlawful and wrongful conduct. Absent a class action, the Class will continue to face the potential for irreparable harm. In addition, these violations of law would be allowed to proceed without remedy and Defendants would undoubtedly continue such illegal conduct. Because of the size of the individual Class members' claims, few Class members could afford to seek legal redress for the wrongs complained of herein.

86. Plaintiffs have retained counsel experienced in handling class action claims and claims involving violations of the Telephone Consumer Protection Act.

87. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendants to comply with federal and Texas law. The interest of Class members in individually controlling the prosecution of separate claims against Defendants is small because the maximum statutory damages in an individual action for a violation of this statute are minimal. Management of these claims is likely to present significantly fewer difficulties than those presented in many class claims. Defendants have acted on grounds generally

applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Class as a whole.

FIRST CAUSE OF ACTION
NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

88. Plaintiffs incorporate by reference all of the above paragraphs of this Complaint as though fully stated herein.

89. The foregoing acts and omissions of Defendants constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227, *et seq.*

90. As a result of Defendants' negligent violations of 47 U.S.C. § 227, *et seq.*, Plaintiffs and the Class are entitled to an award of \$500.00 in statutory damages for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B). Plaintiffs and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

91. Plaintiffs and Class members are also entitled to an award of attorneys' fees and costs.

SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

92. Plaintiffs incorporate by reference the above paragraphs of this Complaint as though fully stated herein.

93. The foregoing acts and omissions of Defendants constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227, *et seq.*

94. As a result of Defendants' knowing and/or willful violations of 47 U.S.C. § 227, *et seq.*, Plaintiffs and the Class are entitled to treble damages, as provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

95. Plaintiffs and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

96. Plaintiffs and Class members are also entitled to an award of attorneys' fees and costs.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request the Court grant Plaintiffs and the Class members the following relief against Defendants:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendants' negligent violations of 47 U.S.C. § 227(b)(1), Plaintiffs seek for themselves and each Class member \$500.00 (five-hundred dollars) in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- An award of attorneys' fees and costs to counsel for Plaintiffs and the Class.
- An order certifying this action to be a proper class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court deems appropriate, finding that Plaintiffs are proper representatives of the Class, and appointing the lawyers and law firms representing Plaintiffs as counsel for the Class.
- Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION
OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendants' willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiffs seek for themselves and each Class member treble damages, as provided by statute, up to \$1,500.00 (one-thousand-five-hundred dollars)

1 for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. §
2 227(b)(3)(C).

3 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
4 conduct in the future.

5 • An award of attorneys' fees and costs to counsel for Plaintiffs and the
6 Class.

7 • An order certifying this action to be a proper class action pursuant to
8 Federal Rule of Civil Procedure 23, establishing an appropriate Class and any
9 Subclasses the Court deems appropriate, finding that Plaintiffs are proper
10 representatives of the Class, and appointing the lawyers and law firms representing
11 Plaintiffs as counsel for the Class.

12 • Any other relief the Court may deem just and proper.

13 **TRIAL BY JURY**

14 Pursuant to the seventh amendment to the Constitution of the United States of America,
15 Plaintiffs are entitled to, and demand, a trial by jury on all counts so triable.

16 Date: July 12, 2016

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